Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1470

MARY FRANCIS LOPEZ,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No.

MARY FRANCIS LOPEZ,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Mary Francis Lopez, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in case number 78-5511, United States of America, Plaintiff-Appellee, v. Mary Francis Lopez, Defendant-Appellant.

OPINIONS BELOW

The opinions and judgments of the United States Court of Appeals for the Fifth Circuit and of the Unit-

years in confinement suspended, with Petitioner to be on probation for two years with a fine of ONE THOUSAND AND NO/100 ($1,000.00) dollars.

It is the denial of the motion to quash the jury that Petitioner asserts in this appeal as error by the trial court.

In a *Per Curiam* opinion of January 24, 1979, a Panel of the Court of Appeals affirmed the decision below. Petitioner asserts that the Panel erred in affirming the decision, as such affirmance conflicts with prior Supreme Court decisions.

Statement of Facts

The facts show that there are a substantial number of Spanish surnamed people in the Division of the District Court in which this case was tried. The U.S. Census figures for 1970 show the percentage of Spanish surnames amounts to 20.5% (Defendant's Exhibit 8). The school enrollment for the area shows the percentage to be 30.9% (Defendant's Exhibit 6).

The Marshall's Summon's List and Jury Attendance lists (2nd Supp. Record on Appeal) as summarized by the attached Ratio Tables (Appendix D) reflect that only 4.3% of those called for jury service from August, 1971, (the date the "Jury Wheel" selection plan for the Northern District of Texas was approved by the Fifth Circuit Judicial Council) through time of trial in 1978 had Spanish surnames.

REASONS FOR GRANTING THE WRIT

The Honorable Panel of the Fifth Circuit Court of Appeals erred in affirming the conviction of Petitioner and the denial by the District Court of Petitioner's Motion to Quash the Jury Panel which was based on Constitutional grounds that Mexican-Americans were systematically excluded from jury service.

A citizen accused has guaranteed to him under the Constitution the most basic right known to our system of government: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial* jury . . ." U.S. Constitution, Sixth Amendment (Emphasis Added). A jury drawn from a system that excludes a class of individuals by reason of race, especially when the accused is a member of that class, is not such an impartial jury. *Whitus v. Georgia*, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967); *Alexander v. Louisiana*, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972).

Mexican-Americans are members of a class which has been recognized as "identifiable" for purposes of determining racial exclusion. *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866.

Petitioner, a Mexican-American, moved to quash the petit jury based upon her constitutional right to an impartial jury. Through statistical as well as opinion, reputation, and other proof. she established that a

significant portion of the population of the Lubbock Division, Northern District of Texas, were Mexican-American. Census figures place the percentage at 20.5%. Testimony of witnesses placed it higher, and demonstrated that the percentage was rising. Likewise, Petitioner demonstrated that the percentage of those summoned by the U.S. Marshall averaged 4.3%.

Castaneda v. Partida, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498, establishes the rule to be applied in determining whether a jury selection procedure passes constitutional muster where race is a factor:

> "In order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs. . . . *Once the defendant has shown substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose,* and the burden then shifts to the State to rebut that case." (Emphasis added) *Castaneda, supra* 430 U.S. at 494, 495.

In the case at bar, defendant has quite clearly shown such a substantial underrepresentation; yet the Government has utterly failed to rebut the evidence and the prima facie case.

Castenada establishes a two-prong basis for determination of the prima facie case: first, that the group is a recognizable, distinct class; and second, that the underrepresentation be proved over a significant period of time, by comparison of percentages of the class in the general population to the percentage of the class included in the jury selection process. 430 U.S. at 494.

Castaneda establishes another element that may be proved to support the claim of discriminatory practice: proof of a system not racially neutral. "Finally, as noted above, a selection procedure that is susceptible of abuse or is not racially neutral *supports the presumption of discrimination raised by the statistical showing.*" (Emphasis added). *Castaneda, supra,* 430 U.S. at 494. Herein lies the error of the Panel in its *Per Curiam* decision: it failed to distinguish a prima facie showing and presumption of discrimination from the shifting of the burden of proof to the Government. The Panel says that *Castaneda* requires a showing of intentional discrimination; yet the case holds that the *presumption* of discrimination has arisen prior to any need for a showing of intent.

The proof in *Castaneda* was primarily that of statistics. The Court agreed that these statistics established a prima facie case of discrimination. In the very next sentence, the Court stated: "*Supporting* this *conclusion* is the fact that the Texas system of selecting grand jurors is highly subjective." (Emphasis added) 430 U.S. at 487. The conclusion of discrimination had already been made from statistical evidence. The same conclusion

exists in the case at bar. Seven years of grossly disproportionate percentages cannot be ignored. Yet the Government has attempted to do so.

The Supreme Court has had occasion to write on this subject in the context of sex discrimination in *Duren v. Missouri*, ____ U.S. ____, 47 Law Week 4089 (1979). That case held a Missouri jury selection system which allowed women to "opt out" of jury service was fatally defective due to the consistently disproportionate numbers of women on venires. *Duren* repeats the requisite of *Castaneda*, and yet it adds another method of proof of discriminatory system. That proof exists in showing a *consistent, continuing exclusion* of the class from the venires. Mr. Justice White, writing for the Court states:

> "[Duren's] undisputed demonstration that a large discrepancy occurred not just occasionally but in every weekly venire for a period of nearly a year manifestly indicates that the cause of the underrepresentation was systematic — that is, inherent in the particular jury-selection process utilized . . . The resulting disproportionate and consistent exclusion of women from the jury wheel and at the venire stage was quite obviously due to the *system* by which juries were selected. Petitioner demonstrated that the underrepresentation of women in the final pool of prospective jurors was due to the operation of Missouri's exemption criteria —

> whether the automatic exemption for women or other statutory exemptions — as implemented in Jackson County." 47 Law Week at 4091.

Where Duren proved a disproportion weekly for one year, Petitioner has proved such exclusion for *seven* years.

The exclusion in *Duren* was systematic; yet the Court did not make any requirement of intent, as would the Panel's decision in the instant case. On the contrary, the low percentage of women in *Duren* probably came from the ability of the women to "opt out" of the jury pool. This shows no "intent" on the part of the state; yet that selection procedure was declared unconstitutional.

The Panel also cites *United States v. Arlt*, 567 F.2d 1295, as somehow controlling. Notwithstanding the fact that the true holding of the case was that no appellant is entitled to two appeals, and that the judgment was "Appeal dismissed," the dicta in the case is not relevant to the case at bar. There, Arlt failed to prove that a cognizable class was systematically excluded from the jury selection process. Here, the evidence is overwhelming that such a systematic exclusion exists. Here, the system *is* the problem. The Panel is correct in that appellant does not contend that the District Clerk discriminated in making up the jury panels. But, as noted in *Castaneda*, "sometimes a clear pattern, unex-

plainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." 430 U.S. at 493. Even though the Mexican-American community may and even has succeeded in electing a Mexican-American representative to the State Legislature, who testified at trial (Vol. 2, Tr. 28-37), such limited successes are inapplicable to a determination of discrimination under any "ruling party" theory. *Castaneda, supra.*

The court in *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966) incorporated by a footnote a quote from *United States v. Greenberg*, 200 F.Supp. 382 (S.D.N.Y., 1961):

> "The test is not whether voter registration lists are used, exclusively or otherwise, as a source of qualified jurors. The test is whether or not the use of such lists results in an array which is a representative cross-section of the community or from which a cognizable group or class of qualified citizens is systematically excluded.

Further, as the court stated in *Camp v. United States*, 413 F.2d 419 (5th Cir. 1969):

> "Use of such lists (voter registration) as the sole source of names for jury duty is constitutionally permissible unless the system results in the systematic exclusion of a cognizable group or class of qualified citizens."

Therefore, the dicta in *Arlt* is inapplicable; the system must *result* in a constitutionally fair and impartial venire and jury.

The system here creates a substantial variance between the proportion of the Mexican-Americans in the general population and the proportion appearing in the jury panels. The Government has failed entirely to rebut the prima facie case of discrimination. The Panel *Per Curiam* decision, if allowed to stand, would substantially alter the rule as set forth by the Supreme Court; that it is the Government that must provide the accused with an impartial jury made up of her peers, and one drawn from all segments of society, including the race in which she is included. The Government has failed to do this; it has failed to rebut the presumption of discrimination established by defendant's evidence.

CONCLUSION

Petitioner respectfully submits that this Court should grant her petition for writ of certiorari and review the decisions of the courts below, and upon hearing reverse the decision below.

Respectfully submitted,

MARK SMITH &
ASSOCIATES
1220 Broadway, Suite 1820
Lubbock, Texas 79401

Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to the Honorable Wade H. McCree, Jr., Solicitor General of the United States, Department of Justice, Washington, D.C., 20530; and one copy to the Honorable Roger McRoberts, Assistant United States Attorney, C-201, U.S. Courthouse, 1205 Texas Avenue, Lubbock, Texas 79401, by placing the same in the United States Post Office, first class postage prepaid, said service being made in compliance with United States Supreme Court Rule 33.

_____

Mark Smith

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

Docket No. CR-5-78-0008

United States of America

versus

MARY FRANCIS LOPEZ

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date JULY 6, 1978.

WITH COUNSEL Mark Smith (Hired)

PLEA
X NOT GUILTY

There being a verdict of GUILTY by jury, 6/16/78.

FINDING & JUDGMENT
Defendant has been convicted as charged of the offense(s) of Obstruction of Correspondence, in violation of Title 18, United States Code, Section 1702.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS. The execution of said sentence of imprisonment is hereby suspended and defendant placed on probation for a period of TWO (2) YEARS.

In addition, defendant is fined the sum of $1,000.00 to be paid on or before August 1, 1978, and to be paid through the U.S. Probation Office.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

/s/ HALBERT O. WOODWARD
HALBERT O. WOODWARD
Chief U.S. District Judge
Date July 6, 1978

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellee,

versus

Mary Frances LOPEZ,
Defendant-Appellant.

No. 78-5511

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Jan. 24, 1979.

Appeal from the United States District Court for the Northern District of Texas.

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* Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

Before CLARK, RONEY and GEE, Circuit Judges.

PER CURIAM:

Mary Frances Lopez was convicted of the intentional obstruction of correspondence in violation of 18 U.S.C. § 1702. During her trial, Lopez filed a motion to quash the petit jury panel, contending that the procedures by which jurors were selected impermissibly discriminated against Mexican-Americans. Lopez rested her claims of discrimination squarely on constitutional grounds; she did not contend that the procedures used by the district court violated the Jury Section and Service Act of 1968, 28 U.S.C. §§ 1861-1874. Lopez contends that the district judge erroneously denied her motion. We affirm.

In order to establish a prima facie case of discrimination in the selection of jurors, a defendant must show (1) that the group allegedly discriminated against "is one that is a recognizable, distinct class singled out for different treatment under the laws, as written or as applied," (2) that the group is underrepresented on jury panels over a significant period of time, and (3) that the selection procedure is not racially neutral or is susceptible to being used as a tool of discrimination. *Castaneda v. Partida*, 430 U.S. 482, 494, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498, 510 (1977).

The district court in which Lopez was tried uses voter registration lists to select potential jurors, as ex-

pressly authorized by § 1863(b)(2). The defendant's claim of discrimination rested entirely on statistics showing that the percentage of Mexican-Americans selected for jury panels was less than the percentage of Mexican-Americans in the entire population for the district. The district judge concluded that this underrepresentation was due solely to the fact that fewer Mexican-Americans register to vote than do other groups within the community.

The evidence Lopez adduced to support her claim of discrimination failed to meet the third requirement set down in *Castaneda*. Lopez does not contend that the district court clerk discriminated against Mexican-Americans in making up the jury panels from the voting lists, nor does she contend that Mexican-Americans have been discriminated against in the voter registration process. *Castaneda* requires that a defendant show that the exclusion of a particular minority group from jury service is due to some form of intentional discrimination; "an official act is not unconstitutional solely because it has a racially disproportionate impact." *Castaneda, supra*, 430 U.S. at 493, 97 S.Ct. at 1279, 51 L.Ed.2d at 509; *see Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597, 607 (1976). A prima facie case of discrimination cannot rest merely on statistics. The fact that an identifiable minority group votes in a proportion lower than the rest of the population and is therefore underrepresented on jury panels presents no constitutional

issue. *United States v. Arlt*, 567 F.2d 1295, 1297 (5th Cir. 1978).

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

February 21, 1979

TO ALL PARTIES LISTED BELOW:

NO. 78-5511 — UNITED STATES OF AMERICA v.
MARY FRANCIS LOPEZ

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk
/s/ SALLY HAYWARD
Deputy Clerk

APPENDIX D

TABLE OF RATIOS

RATIO AND PERCENTAGES OF SPANISH SURNAMES CALLED FOR PETIT JURY SERVICE IN THE LUBBOCK DIVISION OF THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FOR THE PERIOD OF AUGUST, 1971, UNTIL JUNE, 1978.

Figures under the column entitled Ratio refer to the ratio of Spanish surnames in proportion to the total number of individuals called.

Figures under the column entitled Page refer to pages in the second supplement to the record on appeal, where the particular jury list may be found.

MARSHALL'S SUMMONS LIST

1971

DATE	RATIO	PAGE
8-9-71	4/60	299-300
10-18-71	1/35	289
11-1-71	4/15	297

1971 Total 5/110 = 4.5%

JURY ATTENDANCE LIST

1971

DATE	RATIO	PAGE
8-16-71	4/60	301-303
10-18-71	1/45	290-292
11-1-71	0/15	298

1971 Total 5/120 = 4.1%

MARSHALL'S SUMMONS LIST

1972

DATE	RATIO	PAGE
1-4-72	3/60	281-282
2-21-72	2/50	274-75
4-3-72	5/60	264-65
5-16-72	2/60	256-57
7-18-72	5/60	249-50
10-2-72	2/33	243

1972 Total 19/323 = 8.2%

1973

1-8-73	6/50	229-30
3-19-73	9/15	236
7-30-73	3/40	216
9-10-73	4/6	222
9-10-73	3/35	223-24
10-29-73	3/50	200-01

1973 Total 15/205 = 7.2%

JURY ATTENDANCE LIST

1972

DATE	RATIO	PAGE
1-4-72	3/60	286-288
2-21-72	2/50	276-78
4-3-72	5/60	266-69
5-16-72	2/58	258-60
10-2-72	3/58	244-46

1972 Total 15/286 = 5.2%

1973

1-8-73	6/50	231-33
3-19-73	1/41	239-40
7-3-72	3/40	220-21
9-10-73	2/40	227-28
10-29-73	3/48	202-04

1973 Total 15/219 = 6.8%

MARSHALL'S SUMMONS LIST

1974

DATE	RATIO	PAGE
1-7-74	1/45	210-11
3-18-74	4/10	186
5-6-74	1/40	195
9-9-74	0/10	174
9-9-74	0/40	173
11-11-74	0/10	165
11-4-74	0/40	164

1974 Total 2/205 = .09%

1975

2-17-75	0/10	155
5-12-75	1/25	149
7-14-75	1/45	141-42
9-15-75	0/15	130
9-17-75	0/30	132
11-10-75	1/75	114-15
11-24-75	4/15	116
12-1-75	1/37	127
12-8-75	4/27	129

1975 Total 4/279 = 1.4%

JURY ATTENDANCE LIST

1974

DATE	RATIO	PAGE
1-18-74	1/44	212-13
3-8-74	1/44	187-88
5-6-74	1/43	196-97
9-9-74	0/50	175-77
11-11-74	0/50	170-72

1974 Total 3/260 = 1.2%

1975

2-17-75	0/50	157-59
5-12-75	1/48	152-54
7-14-75	1/53	143-45
9-16-75	1/81	127-140
11-10-75	4/85	117-120

10a

MARSHALL'S SUMMONS LIST

1976

DATE	RATIO	PAGE
1-5-76	0/55	103-04
7-12-76	1/40	91-92
8-2-76	0/20	82
10-26-76	1/30	80-81

1976 Total 2/145 = 1.4%

1977

3-14-77	1/50	53-54
5-16-77	2/20	73
8-1-77	4/50	36-37
12-12-77	0/30	29-30
10-17-77	3/60	44-46

1977 Total 10/210 = 4.8%

JURY ATTENDANCE LIST

1976

DATE	RATIO	PAGE
1-14-76	0/72	106-109
5-9-76	0/49	96-98
7-12-76	1/39	99-100
8-2-76	0/55	83-85
9-27-76	0/54	88-89

1976 Total 1/175 = 0.6%

1977

3-14-77	3/74	64-69
3-14-77	4/104	55-58
8-1-77	5/66	41-43
10-17-77	6/45	47-49
12-12-77	2/58	31-33

1977 Totals 20/347 = 5.7%

11a

MARSHALL'S SUMMONS LIST

1978

DATE	RATIO	PAGE
1-10-78	4/50	11-12
1-10-78	0/10	14
6-12-78	2/20	3
6-12-78	6/50	1-2

1978 Total 12/130 = 9.2%

OVERALL TOTAL 69/1608 = 4.3%

JURY ATTENDANCE LIST

1978

DATE	RATIO	PAGE
1-10-78	4/61	15-18
3-6-78	3/55	24-26
4-3-78	2/32	22-23
6-12-78	6/71	4-7

1978 Total 15/219 = 6.8%

OVERALL TOTAL 84/1643 = 5.1%

Supreme Court, U. S.
FILED
JUN 7 1979
MICHAEL RODAK, JR., CLERK

No. 78-1470

In the Supreme Court of the United States

OCTOBER TERM, 1978

MARY FRANCIS LOPEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Assistant Attorney General

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1470

MARY FRANCIS LOPEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-6a) is reported at 588 F. 2d 450.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1979. A petition for rehearing was denied on February 21, 1979. The petition for a writ of certiorari was filed on March 23, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the jury selection plan for the Northern District of Texas is unconstitutional because it results in jury service by fewer Mexican-American citizens than might be expected on the basis of population.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of the intentional obstruction of correspondence, in violation of 18 U.S.C. 1702.[1] She was sentenced to a suspended term of two years' imprisonment and was placed on probation for that period. She was also fined $1,000. The court of appeals affirmed (Pet. App. 3a-6a).

Before trial, petitioner moved to quash the impaneled petit jury on the ground that it was unconstitutionally selected and failed to represent a cross-section of the population in the Lubbock Division of the Northern District of Texas. During the hearing on this motion, petitioner introduced census evidence showing that in 1970 persons with Spanish surnames accounted for approximately 20% of the population in the Lubbock Division of the Northern District of Texas (Tr. 35; Def. Exh. 8).[2] In contrast, petitioner asserted, the Marshal's lists of persons summoned for jury duty during the years 1971 to 1978 revealed that a much smaller percentage of the persons summoned had Spanish surnames.[3] Several witnesses familiar with the area

[1]The evidence at trial, which petitioner does not contest, showed that she endorsed and deposited into her husband's business account a United States Treasury check that had been mailed to a third party.

[2]"Tr." refers to the transcript of the hearing on petitioner's motion to quash. The hearing occurred on June 13, 1978. The jury was chosen the previous day, and petitioner was tried on June 16, 1978.

[3]In her petition (Pet. 4, 6; Pet. App. 12a), petitioner states that, from August 1971 through June 1978, approximately 4.3% of the persons summoned for jury duty in the Lubbock Division of the Northern District of Texas had Spanish surnames. At the hearing in the district court, petitioner's counsel stated (Tr. 69) that the correct figures were approximately 2.0% in 1974, 2.5% in 1975, 2.3% in 1976, 4.5% in 1977, and 5.2% in the first half of 1978. The tables reprinted in Appendix D to the petition (Pet. App. 8a-12a) appear to contain some significant computational errors. For example, the total for the Marshal's Summons Lists in 1974 seemingly should read "6/205 = 2.9%" rather than "2/205 = .09%" (see Pet. App. 10a). If these apparent errors were corrected throughout the Marshal's Summons List tables, the total figures for 1971 through 1978 would become "98/1588 = 6.2%" rather than "69/1608 = 4.3%" (see Pet. App. 12a). Assuming the accuracy of petitioner's raw data, her statistics would still demonstrate that persons with Spanish surnames are not as well represented among persons summoned to serve on juries as they are in the general population.

testified that the Mexican-American population was an identifiable group, increasing in number and including many members qualified to serve as federal jurors (Tr. 33-34, 36, 43-44, 50, 52-53, 56-59). The witnesses also stated that there was some prejudice and discrimination against Mexican-Americans in the area, but that the problem was not as serious as it had been and that the situation was improving (Tr. 37, 44-47, 51). They further testified (Tr. 39, 45, 51-53, 53-55, 60, 61-62) that in recent years they had not witnessed resistance or impediments to minority group members seeking to register to vote; in fact, they said, voter registration drives directed at the Mexican-American population had been relatively successful, although a substantial number of eligible Mexican-Americans remained unregistered.

Petitioner's attorney disavowed any contention that the Clerk of the district court was administering the District's jury selection plan in a discriminatory fashion and admitted that the evidence showed there was no

interference with the voting rights of persons with Spanish surnames (Tr. 71-73).

The district court agreed (Tr. 71) with petitioner that the percentage of persons with Spanish surnames was greater in the general population than among those summoned for jury duty. Nevertheless, relying on the testimony of the witnesses and on the Clerk's Certificate of Compliance with the Jury Selection Plan,[4] the court found (Tr. 72, 112) that the plan had been followed and that jury panels had been selected on an objective, non-discriminatory basis. The court therefore concluded that the statistical disparity stressed by petitioner demonstrated only that the percentage of voter registrants within the Mexican-American population was lower than the corresponding percentage in the population as a whole. Because the evidence showed that the disparity was not the product of discrimination in the jury selection process, the court denied petitioner's motion to quash (Tr. 111-113).[5]

[4]The Clerk's Certificate and its formal acceptance by the district court are reprinted in the Appendix, *infra*.

[5]The court also stated (Tr. 113) that the motion could and should be denied because petitioner failed to follow the procedures established for challenging jury selection methods under the Jury Selection and Service Act of 1968, 28 U.S.C. 1867. But petitioner's claim is constitutional; she does not challenge the district court's plan for non-compliance with the 1968 statute, and, accordingly, she is not obliged to observe the procedural requisites of that Act. See, *e.g.*, *United States* v. *De ALBA-CONRADO*, 481 F. 2d 1266, 1270 n.5 (5th Cir. 1973).

The court of appeals affirmed, holding that petitioner failed to meet her burden of showing that "the exclusion of a particular minority group from jury service is due to some form of intentional discrimination" (Pet. App. 5a). Citing *Castaneda* v. *Partida*, 430 U.S. 482, 494 (1977), the court stated that "[i]n order to establish a prima facie case of discrimination in the selection of jurors, a defendant must show * * * that the selection procedure is not racially neutral or is susceptible to being used as a tool of discrimination" (Pet. App. 4a). The court concluded that petitioner did not make such a showing in connection with the practice of selecting jurors at random from voter registration lists in the Northern District of Texas.

ARGUMENT

Petitioner contends (Pet. 5-11) that the jury selection plan in effect in the Northern District of Texas systematically excludes Mexican-Americans and that she therefore was denied her Sixth Amendment right to a jury drawn from a fair cross-section of the community. She argues that the statistics she introduced showed an underrepresentation of persons with Spanish surnames on the jury service lists for the years 1971 through 1978.[6] This

[6]Petitioner states (Pet. 4) that persons with Spanish surnames account for more than 20% of the total population in the Lubbock Division of the Northern District of Texas. Because the Northern District's jury selection plan relies on voter registration lists, however, the voting age population provides a more accurate point of comparison. As the computations in the government's brief in the court of appeals show (Br. 9 n.6 and Addendum), persons with Spanish surnames constitute slightly less than 15% of the Lubbock Division's voting age population. Even this figure may overstate the percentage of Spanish surnamed persons eligible to serve on juries in the district, since it may include a number of persons who are not citizens or who do not speak English (see 28 U.S.C. 1865(b)).

showing of underrepresentation, petitioner asserts, was sufficient to establish a prima facie case of discrimination, a case that the government's evidence failed to rebut. Petitioner is incorrect.

Earlier this Term, in *Duren* v. *Missouri*, No. 77-6067 (Jan. 9, 1979), this Court summarized the requirements for a prima facie showing of discrimination in the jury selection process. The Court stated (slip. op. 6):

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Petitioner's evidence failed to satisfy the third part of this test. The statistics derived from the Marshal's jury service lists do not show that the underrepresentation of Mexican-Americans is due to "systematic exclusion" of the group in the jury selection process. Indeed, the jury selection plan in effect in the Northern District of Texas does not systematically exclude any ethnic group. Jury service lists are drawn at random from lists of registered voters in each county comprised within the Northern District. Petitioner does not contend that the random selection process excludes registered Mexican-American voters; nor does she argue that Mexican-Americans are prevented or discouraged from registering to vote in the District. The statistical disparity between the percentage

of persons with Spanish surnames in the voting age population and the percentage of persons with Spanish surnames on the Marshal's jury lists is not by itself sufficient to show "systematic exclusion" within the meaning of *Duren*. If it were, the third requirement for a prima facie case enumerated in *Duren* would be superfluous. Any showing of underrepresentation continuing over a period of time would be sufficient to establish "systematic exclusion."

In several cases, this Court has invalidated jury selection systems that resulted in the exclusion or underrepresentation of an identifiable group and thereby deprived defendants of their right to a jury drawn from a fair-cross-section of the community. See, *e.g.*, *Castaneda* v. *Partida*, 430 U.S. 482 (1976); *Taylor* v. *Louisiana*, 419 U.S. 522 (1975); *Alexander* v. *Louisiana*, 405 U.S. 625 (1972); *Turner* v. *Fouche*, 396 U.S. 346 (1970). In each of these cases, however, the jury selection plan involved some subjective device by which members of the identifiable group could choose to exclude themselves or could be deliberately excluded by those charged with the responsibility for jury selection. *Castaneda*, for example, involved the Texas "key man" system under which county grand jurors were selected, largely on a subjective basis, by appointed jury commissioners. If the commissioners had been so disposed, they could easily have arranged for an identifiable ethnic or racial group to be underrepresented on the grand jury lists. *Taylor* involved the Louisiana "opt-in" requirement for women who wished to serve on petit juries. The state law provided that a woman would not be selected for jury service unless she had previously filed with the court clerk a "declaration of her desire to be subject to such service."

Not surprisingly, this additional statutory hurdle, applicable only to women, resulted in the underrepresentation of women on Louisiana juries. Here, by contrast, the objective, random nature of the jury selection method employed in the Northern District of Texas does not permit the systematic exclusion of any group represented on the registered voter lists.

In enacting the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.*, Congress approved the use of voter registration lists as the principal source of names of prospective jurors.[7] Federal courts that have considered the matter have sustained the use of such lists as the basis for compiling lists of prospective jurors, even when defendants have objected that this method of jury selection results in the underrepresentation of identifiable groups whose members are underrepresented among registered voters. See, *e.g.*, *United States* v. *Arlt*, 567 F. 2d 1295, 1297 (5th Cir.), cert. denied, 436 U.S. 911 (1978); *United States* v. *Grismore*, 546 F. 2d 844, 848 (10th Cir. 1976); *United States* v. *Freeman*, 514 F. 2d 171 (8th Cir. 1975); *United States* v. *Guzman*, 468 F. 2d 1245 (2d Cir. 1972), cert. denied, 410 U.S. 937 (1973). See also *United States* v. *Goff*, 509 F. 2d 825 (5th Cir.), cert. denied, 423 U.S. 857 (1975); *Simmons* v. *United States*, 406 F. 2d 456, 462-463 (5th Cir.), cert. denied, 395 U.S. 982 (1969) ("[n]o significant improvement in our nation's federal judicial machinery has ever met such unanimity of opinion as to its importance and propriety as has adoption by the Congress of the system of jury selection at random from voter registration lists.")

[7]Congress also provided that the jury selection plan for each federal district "shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by" the statutory provisions prohibiting exclusion from jury service on the basis of "race, color, religion, sex, national origin, or economic status." See 28 U.S.C. 1862, 1863(b)(2).

Petitioner does not argue that the failure of the Northern District's plan to prescribe sources of names in addition to the voter lists violates the requirements of Section 1863(b)(2). See note 5, *supra*.

Petitioner does not allege that the jury selection plan for the Northern District of Texas was adopted with an intent to discriminate against Mexican-Americans, nor does she suggest that state or county election officials in the District have placed special obstacles in the path of Mexican-Americans who wish to register to vote. It is true, of course, that any Mexican-American in the District who wishes to avoid federal jury service can do so by refusing to register to vote. But this voluntary method of self-exclusion is an option available to every person of voting age in the District, not just to Mexican-Americans or persons with Spanish surnames. The jury selection plan thus does not entail any special dispensation for an identifiable group that results in the underrepresentation of that group on jury lists. The Court in *Duren* found the Missouri selection system objectionable because it permitted women, and only women, to obtain an exemption from jury service upon request. No such systematic method of reducing the representation of Mexican-Americans is inherent in the Northern District's jury selection plan.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1979

DOJ-1979-06

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

MISCELLANEOUS NO. 16

FINDINGS OF THE COURT AND ORDER TO FILL THE QUALIFIED JURY WHEEL IN THE LUBBOCK DIVISION

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
SEP. 27, 1977
JOSEPH McELROY, JR., CLERK
BY /s/ Peggy Thillet
Deputy

Based on the report and recommendations of the Clerk made on the 27th day of September, 1977, and based on the information contained in the returned juror qualification questionnaires mentioned therein;

THE COURT FINDS that five hundred forty (540) persons identified in the report are disqualified and/or exempt or excused for the reasons set out in the Plan for Selection of Jurors in the Northern District of Texas, to which reference is made on the back of the questionnaires.

THE COURT FURTHER FINDS that the remaining eight hundred eighty (880) persons identified in the report are qualified for jury sevice.

IT IS, THEREFORE, ORDERED that the previously existing jury wheels in the Lubbock Division be purged and after all persons selected to serve as jurors before the Master Wheel was emptied, have completed such service, that all records and papers complied and maintained by the Jury Commission or Clerk before the Master Wheel was emptied, shall be preserved in the custody of the Clerk for four (4) years and shall be available for public inspection for the purpose of determining the validity of the selection of any jury as provided in section 1868, Title 28, United States Code.

IT IS FURTHER ORDERED that the names of eight hundred eighty (880) persons found to be qualified be placed in the Qualified Jury Wheel in the Lubbock Division and that all jurors summoned to appear on or after October 1, 1977, be drawn therefrom.

ENTERED this 27th day of September, 1977.

/s/ W.M. Taylor
JUDGE, UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

MISCELLANEOUS NO. 16

CERTIFICATE OF COMPLIANCE WITH THE ORDER OF THE COURT HERETOFORE ENTERED ON MARCH 14, 1977, RELATING TO SELECTION OF JURORS, TOGETHER WITH THE REPORT AND RECOMMENDATION OF THE CLERK PERTAINING TO THE LUBBOCK DIVISION

U.S. District Court
Northern District of Texas
FILED
SEP. 27, 1977
JOSEPH McELROY, JR., CLERK
BY /s/ Peggy Thillet
Deputy

Pursuant to the Order of the Court heretofore entered on the 14th day of March, 1977, and in accordance with the procedure outlined in paragraph 5 of the Plan for Selection of Jurors in the Northern District of Texas, the names of four percent (4%) of the registered voters in each county in the Lubbock Division were selected for filling of the Master Jury Wheel. Twenty-five (25) numbers were placed in a container and number ten (10) was selected at random therefrom. Beginning with the tenth (10th) name on each county list, every twenty-fifth (25th) name was taken. A total of seven thousand five hundred thirty-seven

(7,537) names was obtained, reflecting a total voter population of one hundred eighty-eight thousand five hundred eighty-seven (188,587) in the Lubbock Division. The breakdown by county is as follows:

County	Total Voters Selected (4%)	Total Voter Population
Bailey	131	3,275
Borden	20	509
Cochran	99	2,484
Crosby	170	4,259
Dawson	251	6,284
Dickens	83	2,084
Floyd	322	8,059
Gaines	207	5,184
Garza	100	2,509
Hale	623	15,584
Hockley	392	9,809
Kent	35	884
Lamb	358	8,959
Lubbock	3,735	93,384
Lynn	162	4,059
Motley	52	1,309
Scurry	315	7,884
Terry	324	8,109
Yoakum	158	3,959
	7,537	188,587

An alphabetical list of the names so selected was prepared and the names placed in the Master Jury Wheel.

Thereafter, one thousand eight hundred eighty-five (1,885) names were selected from the Master Jury Wheel, as provided in paragraph 6(1) of the Plan, and a questionnaire, including appropriate instructions, directing the completion and return of the questionnaire within ten (10) days, was mailed to each person whose name was so selected. As alphabetical list of the names so drawn was prepared.

Of the one thousand eight hundred eighty-five (1, 885) questionnaires mailed, one thousand four hundred twenty (1,420) have now been returned as directed. The Clerk and his deputy clerks have reviewed the answers on the one thousand four hundred twenty (1,420) questionnaires returned and have noted on the back thereof in an appropriate block, based on the information provided by him, whether he is qualified, exempt or entitled to be excused on request. It appears from the information returned on the one thousand four hundred twenty (1,420) questionnaires, for the reasons specified in the appropriate blocks thereof, eight hundred eighty (880) persons may be deemed qualified, one hundred ninety-four (194) persons may be deemed not qualified, twenty (20) persons may be deemed exempt, three hundred twenty-six (326) persons may be deemed entitled to be excused on request and two hundred sixty-one (261) returned undelivered.

RECOMMENDATIONS:

Based solely on the information provided in the return questionnaires, I recommend that we be authorized to purge the existing Jury Wheels. I further recommend that those eight hundred eighty (880) persons whose returned questionnaires reflect no basis for disqualification,

exemption or excuse be found to be qualified and that such finding be reflected by a check mark placed on the juror qualification form and by a check mark placed on the list of names drawn from the Master Jury Wheel to whom questionnaires were mailed.

Based solely on the information provided in the returned questionnaires, I recommend that those one hundred ninety-four (194) persons whose questionnaires reflect information providing a basis for disqualification for the reasons noted on such questionnaires; those twenty (20) persons whose questionnaires reflect information providing a basis for exemption for the reasons noted on the questionnaires; and those three hundred twenty-six (326) persons whose questionnaires reflect information providing a basis for being excused on request for the reasons noted on such questionnaires be found to be not qualified and/or exempt or excused for the reasons reflected on the back of the questionnaires, and that such finding be reflected on the questionaire and the list of names drawn from the Master Jury Wheel.

I further recommend that the existing Qualified Jury Wheel be purged and that the names of eight hundred eighty (880) persons found to be qualified and not exempt or excused be placed in the Qualified Jury Wheel in this Division.

Dated this 27th day of September, 1977.

/s/ Joseph McElory, Jr. Clerk

JOSEPH MCELROY, JR. CLERK
UNITED STATES DISTRICT COURT